



THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

May 16, 1973

Honorable David Finney
Chairman, State Affairs Committee
House of Representatives
P. O. Box 2910
Austin, Texas 78767

Letter Advisory No. 35

Re: Constitutionality of the
sub-committee substitute
to H. B. 742, that the
state shall insure a fair
portion of purchases and
contracts to be placed with
small business concerns.

Dear Representative Finney:

You have requested the opinion of this office as to the constitutionality under the Texas Constitution of the sub-committee substitute to H. B. 742, the proposed Small Business Procurement Act. The proposal expresses the policy of the State to insure a fair portion of its purchases and contracts be placed with small business concerns (Sec. 1); provides for certain agencies of the state (Sec. 3) to designate certain contracts as small business set-asides (Sec. 5) for letting to qualified small businesses (Sec. 4); provides for rejection of all bids under specified circumstances (Sec. 6); states that all transactions under the Act are subject to the provisions of certain existing acts governing state purchases and construction (Sec. 7); and requires the appointment of a small business procurement specialist for each agency covered, and enumerates his duties (Sec. 8).

It has been held that except to whatever extent limited by the Constitution, the State of Texas has the power and right to contract as fully as an individual or corporation, and may establish, through the Legislature, the general public policy regarding its contracts.

With respect to requirements for competitive bidding, Section 21 of Article 16 of the Texas Constitution provides as follows:

"All stationery, and printing, except proclamations and such printing as may be done at the Deaf and Dumb Asylum, paper, and fuel used in the Legislative

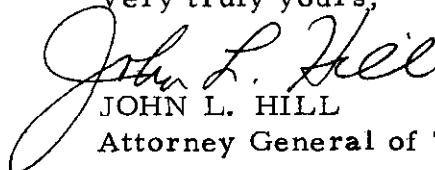
and other departments of the government, except the Judicial Department, shall be furnished, and the printing and binding of the laws, journals, and department reports, and all other printing and binding and the repairing and furnishing the halls and rooms used for the meetings of the Legislature and its committees, shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price, and under such regulations, as shall be prescribed by law. No member or office shall be in any way interested in such contracts; and all such contracts shall be subject to the approval of the Governor, Secretary of State and Comptroller,"

This constitutional requirement will not permit the creation of small business set-asides as to those items which the Constitution requires "be performed under contract, to be given to the lowest responsible bidder," since such restriction could well result in the exclusion from participation of the lowest responsible bidder.

As to other items, the Legislature retains the power to contract and regulate contracts. It is therefore our opinion that, except as to those items governed by Article 16, Section 21, Texas Constitution, the proposed bill does not contravene the Texas Constitution.

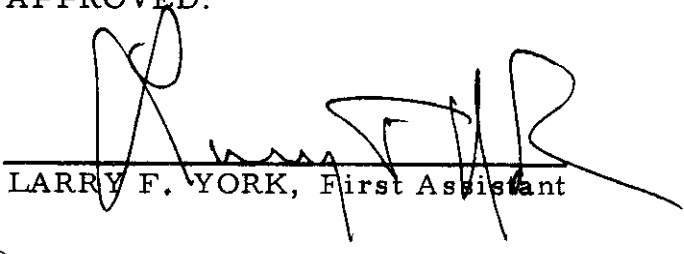
Texas National Guard Armory Board v. McCraw, 126 S. W. 2d 627 (Tex. 1939); Rhoads Drilling Co. et al v. Allred, 70 S. W. 2d 576 (Tex. 1934); Charles Scribner's Sons v. Marrs, 262 S. W. 722 (Tex. 1924); Conley v. Daughters of the Republic, 156 S. W. 197 (Tex. 1913); 81 C. J. S., States, Sections 112, 116; 64 Am. Jur. 2d, Public Works and Contracts, Section 34; 52 Tex. Jur. 2d, State of Texas, Section 31.

Very truly yours,



JOHN L. HILL
Attorney General of Texas

Honorable David Finney, page 3 (LA No. 35)

APPROVED:



LARRY F. YORK, First Assistant



DAVID M. KENDALL, Chairman
Opinion Committee